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02-473

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IN THE SUPREME COURT OF THE UNITED STATES

* * *

UNITED STATES OF AMERICA,

Petitioner,

v.

LASHAWN LOWELL BANKS,

Respondent.

MOTION TO PROCEED *IN FORMA PAUPERIS*

COMES NOW the Respondent, Lashawn Lowell Banks, by and through his appointed counsel, Randall J. Roske, Esquire and respectfully moves this Honorable Court for its order permitting the Respondent to proceed *in forma pauperis*. The motion is supported by the affidavit of counsel and memorandum of points and authorities.

DATED this January 23, 2003.

Respectfully submitted,

Randall J. Roske, Esquire
511 South Tonopah Drive
Las Vegas, Nevada 89106-4026
Attorney for Respondent,
LASHAWN BANKS

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE FACTS

The Respondent, Lashawn Lowell Banks, originally retained private counsel through is family to represent him in United States District Court (please see affidavit of counsel attached as Exhibit A for these and the following facts). After pleading guilty he requested appointment of new counsel. Mr. Banks executed the appropriate affidavit of financial condition under the Criminal Justice Act, Title a18 U.S.C. §3006A. This form is commonly denominated as a "CJA form 23." The district court determined that Mr. Banks qualified for the appointment of counsel under the provisions of title 18 U.S.C. §3006A as a person who was without the means to retain counsel. The office of the Federal Public Defender was thereafter appointed to represent the Respondent, who was then pending sentencing in district court. Due to conflicts with his assigned assistant federal public defender, this author was appo.nted counsel to represent Respondent as a Criminal Justice Act panel attorney. This author has represented respondent under the Criminal Justice Act appointment in district court and the United States Court of Appeals for the Ninth Circuit. Mr. Banks presently is out of custody dn supports his two children as a laborer for a tile and marble firm in Las Vegas, Nevada. Mr. Banks does not have the financial means to pay the costs of printing briefs, let alone defer the costs of counsel in the Supreme Court of the United States.

DATED this January 23, 2003.

Respectfully submitted.

Randall J. Roske, Esquire
511 South Tonopah Drive
Las Vegas, Nevada 89106-4026
Attorney for Respondent,
LASHAWN BANKS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers. That on January 23, 2003, she served a copy of the above and foregoing motion by placing said copy in a postpaid envelope, addressed to the person(s) hereinafter named, at the address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States mail at Las Vegas, Nevada or by hand delivery

Addressee: Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Helena Bozzo

No. 02-473

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

LASHAWN LOWELL BANKS, RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Counsel for Lashawn Lowell Banks

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The respondent, Lashawn Lowell Banks, by and through his appointed counsel, Randall J. Roske, respectfully submits his brief in opposition to the Solicitor General of the United States of America's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 282 F.3d 699 (9th Cir. 2002). The district court's order denying respondent's motion to suppress is unreported, as is the recommendation and report of the magistrate judge advising the district judge to deny respondent's suppression motion after evidentiary hearing. These documents are set forth in the Appendix of the petitioner, infra 20a-21a and 22a-32a, respectively.

JURISDICTION

Respondent concedes that the request for this Court to accept jurisdiction of this case is properly presented under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Title 18 of the United States Code Section 3109 states:

Breaking doors or windows for entry or exit:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

COUNTER STATEMENT

Respondent was indicted for possession of a controlled substance with intent to distribute, a violation of Title 21 U.S.C. §841(a)(1), (count one) and with possession of a firearm as an unlawful drug user, a violation of Title 18 U.S.C. §922(g)(3). Respondent filed a motion to

suppress the evidence obtained in violation of the Fourth Amendment and the "knock-and-announce" statute, Title 18 U.S.C. §3109. An evidentiary hearing was held by the magistrate judge who issued a recommendation and report to the district court that the respondent's motion be denied. The district court judge thereafter denied respondent's motion. Respondent plead guilty to both counts of the indictment reserving the right to appeal the denial of his suppression motion. Respondent was sentenced to serve 11 years and three months by the district court. A timely appeal was taken to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the district court's denial of the suppression motion on Fourth Amendment grounds after careful examination of all the undisputed facts of this case. The Court of Appeals recognized that the forcible entry here was made in the absence of exigent circumstances. The court of appeals examined all relevant factors and concluded that under the facts unique to this case, the officers executing the warrant had failed to wait a sufficient amount of time before inferring a refusal of admittance.

1. The facts adduced at the evidentiary hearing are as follows:

Sometime in early July of 1998, a joint state and federal drug task force (the North Las Vegas Federal Drug Task Force) received word from a confidential informant that a person known as "Shakes" was selling cocaine and the informant believed he could make a controlled purchase. The informant related that "Shakes" lived at 1404 Henry Drive, apartment D, in North Las Vegas, Nevada. Officer Crespo of the North Las Vegas Police Department arranged for $200 from the narcotics buy fund to have the informant make a controlled buy. He then searched the informant for money and drugs before supplying the $200 to the informant. Officer Crespo then drove him to the 1404 Henry Drive apartment. The informant then went into apartment "D" and returned a short while later with two large off white rocks of cocaine. The informant identified the seller as "Shakes." No further identifying information was provided.

Officer Crespo sought a search warrant for 1404 Henry Drive, apartment D on July 8, 1998. This warrant was authorized by the justice of the peace on the same day. The warrant

described apartment D as a two bedroom upstairs apartment.

On July 15, 1998, at 2 p.m. the members of the joint task force assembled to raid respondent's apartment. Officer Crespo, along with members of the SWAT team, was stationed at the entrance to apartment D. The members of the SWAT team were wearing tactical assault garb, including hoods or masks to disguise their identity. The entry team was armed with fully automatic weaponry. FBI Agent Tomasso was stationed at the rear of the apartment building and apparently could hear the entry team. The officers executing the warrant did not know whether anyone was in the apartment. Officer Crespo knocked loudly and announced "Police, search warrant" in a loud authoritative tone. Officer Crespo did not hear anything back. Officer Crespo waited "at least 15 seconds" before ramming open the apartment door." FBI Agent Tomasso who was stationed at the rear of the apartment, opined that the time interval was "I think twenty seconds, maybe." When the door flew open respondent was found wet, soapy and naked a few steps from the bathroom.

Respondent testified that he was taking a shower when he heard a loud "boom." He heard no knock or announcement, but did hear a loud noise of the battering ram. He turned off the water and stepped out of the bathroom when in came rushing masked men in black outfits armed with guns. Respondent was immediately proned out, face down by an armed man. He did not know whether the man was a robber or a police officer. Thereafter, respondent was handcuffed and taken naked to the kitchen table for interrogation. Meanwhile, the SWAT team conducted the search of his apartment. Drugs, weapons and other evidence were located in respondent's apartment. Respondent was the sole occupant of apartment D.

2 A majority of the judges acting as a three judge panel reversed the district court's denial of respondent's motion to suppress.[1] The majority opinion was written by Judge Henry A. Politz, a senior judge of the Fifth Circuit Court of Appeals sitting by designation in the Ninth

[1] The suppression motion raised Fifth and Sixth Amendment issues which were rejected by the court of appeals, and are not the subject of the petition before this Court.

Circuit Court of Appeals.

The petitioner notes that in the decision below, that the Court cited four general categories of knock-and-announce cases (see Pet. at 4-5). Petitioner incorrectly states: "The majority set forth four categories of knock-and-announce cases, each requiring a different lapse of time before an officer may enter a residence after knocking and receiving no response." The Petitioner then quotes the decision below, *United States v. Banks*, 282 F 3d 699 at 705, (9th Cir. 2002), App. 5a:

> (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or lapse of an even more substantial amount of time.

The majority in *Banks* did not refer to the four basic categories as setting "a different lapse of time before an officer may enter a residence after knocking and announcing and receiving no response" as argued by the petitioner (See Pet. at 4). The majority referred to the consideration of the four basic categories as "aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances" under Title 18 U.S.C. §3109 (See *Banks* 282 F.3d at 705; App. 6a). The majority explicitly noted "'there are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case'" [See, *Banks* at 704-705; App 5a; c.f. *McClure v. United States*, 332 F 2d 19, 22 (9th Cir. 1964)]. The "four categories of entries" under Title 18 U.S.C. §3109 referred to by the majority in *Banks* are distilled from the case of *Bustamonte-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973), and is an effort to take into account the interests served by Title 18 U.S.C. §3109 in "(a) reducing the risk of harm to both the officer and the occupants of the house to be entered; (b) helping to prevent the unnecessary destruction of private property; and symbolizing respect for individual privacy summarized in the adage that 'a man's home is his castle.'" *Banks*,

282 F.3d at 705; App. 5a, citing *Bustamonte Gamez*, 488 F.2d 4, 9 (9th Cir. 1973), quoting *Miller v. United States*, 357 U.S. 301, 307 2L.Ed.2d 1332, 78 S.Ct. 1190 (1958).

The majority in *Banks* noted that the officer's entry was made after knocking and announcing their authority and purpose. The question presented in *Banks* is whether the officers could reasonably infer a refusal of admittance from the passage of a mere 15-20 seconds under a totality of the circumstances surrounding the execution of the warrant (See, *Banks*, 282 F.3d at 705; App. 7a)

The majority in *Banks* concluded, after a careful examination of the record, no exigent circumstances existed (see, 282 F.3d at 704, ft.nt. 3; App. 6a). Exigent circumstances exist when "'there [is] a likelihood that the occupants [will] attempt to escape, resist, destroy evidence, or harm someone within . . . .'" [Id., c.f. *United States v. McConney*, 728 F.2d 1195, 1204-05 (9th Cir. 1984) (en banc opinion)]. The petitioner notes the *Banks* majority's conclusion that no exigent circumstances specific to the case existed, but does not squarely explain why this conclusion is wrong. The *Banks* majority opinion articulated a series of non- exclusive factors to determine whether, under the totality of the circumstances, the duration of the officer's pause was reasonable (282 F.3d at 704; App. *infra* 6a-7a). These factors are:

> (a) size of residence; (b) location of the residence; (c) location of the officers in relation to the main living areas of the residence (d) time of day; (e) the nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and; if any, the type of offence for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary. (Id. App. 6a-7a).

The majority opinion in *Banks* conducted the following analysis:

> In the case before us, the officers knocked once and announced their purpose. The officers heard no sound coming from the small apartment that suggested that an occupant was moving away from the door, or doing anything else that would suggest a refusal of admittance. We know from the record sounds were transmitted relatively easily for [FBI Agent] Tomasso, waiting outside at the rear of the apartment, heard Officer Crespo's knock at the front door. Yet none of the officers testified that they heard any sound coming from within the apartment. There was nothing else that triggered the officers' senses, and there were no exigent circumstances warranting a waiver of the reasonable delay. The officers had no specific knowledge of any facts or reasonable expectations from which they could reasonably have believed that entry into Bank's residence would pose any risk greater than the ordinary danger of executing a search warrant on a private residence.
>
> Because the officers were not affirmatively granted or denied permission [to enter], they were required to delay acting for a sufficient period of time before they could reasonably conclude that they impliedly had been denied admittance. After pausing a maximum of fifteen to twenty seconds, the officers forced entry. Banks came out of his shower upon hearing the sound of his door being forced open, and stumbled into the hallway concerned that his apartment was being invaded. Upon entering, the officers found Banks naked, wet and soapy from his shower. Under these circumstances, we are not prepared to conclude that the delay of fifteen to twenty seconds after a single knock and announcement before forced entry was, without an affirmative denial of admission or other exigent circumstances, sufficient in duration to satisfy the constitutional safeguards.

Banks, majority opinion, 282 F.3d at 705-706; App. *infra* 7a-8a). Several facts not mentioned by the majority opinion, are that the officers had no knowledge of any other occupant of the apartment, except the person identified as "Shakes," and that at the time of the warrant's execution the officers were unsure of whether anyone was, in fact, home. There was no evidence adduced that surveillance was established anytime except just prior to the warrant's execution. Further, beyond identifying the place to be searched as a two bedroom apartment, its exact layout prior to the search, was apparently unknown.

The petitioner concedes that the majority opinion in *Banks* "did not indicate how much delay before entering was necessary to satisfy the Fourth Amendment." (Pet. 6). The dissenting Judge Fisher, in his opinion, criticized the majority opinion in *Banks* as neglecting to address all of the factors it identified as relevant to the inquiry. Judge Fisher was referring to the non-exclusive list of factors set forth by the majority opinion. 282 F.2d at 705; App. *infra* 14a-19a). Judge Fisher specifically identified, as "discounted factors:" (a) [the] size of the residence;" "(c) location of the officers in relation to the main living or sleeping areas of the residence;" and "(e) [the] nature of the suspected offense." Judge Fisher, in his dissent, admits "this case is a close call" and acknowledges "it is disquieting to visualize Banks' shock and embarrassment as he emerged naked and still soapy from his shower and confronted the officers who had just burst through his front door." (282 F.3d at 707; App. *infra* 11a). The dissenting judge's claim that the majority opinion failed to give weight to the factors identified as the size of the residence,

location of the officers and the nature of the offense is offset by the other facts specific to *Banks*. Even in a small apartment, an individual who is in the shower or using the bathroom cannot be *reasonably* expected to answer the door in twenty seconds or less. Law enforcement officers set the timing of their raids. They are calculated to take the occupants (or here the sole occupant) off guard.

It is conceded by Judge Fisher in his dissent that, "there is no Ninth Circuit precedent directly on point." (282 F.3d at 709; App. *infra* 16a). The dissenting judge then cites cases outside the controlling circuit, to justify entries anywhere from 10 to 20 seconds after the knock. Without addressing each case here individually, these cases all have significantly different fact patterns making them distinguishable from the case at bar. Petitioner seizes on Judge Fisher's comment that the majority provides no meaningful guidance to law enforcement officers. (Pet. 6). As will be addressed more fully below, this Court's cases teach that there are no set rules for what is a reasonable delay under the Fourth Amendment principles. Where the police are confronted with no explicit refusals of admittance by a sole occupant of a dwelling, it may be necessary for them to pause to consider that the person may be engaged in a private activity which society recognizes would prevent a prompt response to the door.

REASONS FOR DENYING THE PETITION

A. The *Banks* Majority Opinion is Consistent With This Court's Precedent.

The decision of the majority in *Banks* does not create a "rigid, categorical approach" to Fourth Amendment analysis as claimed by Petitioner (Pet 7). The "four categories" identified in the majority opinion in *Banks* are intended to be "aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances." (*Banks*, 282 F.3d at 704, App. *infra* 5a-6a). The guidance offered by the *Banks* majority was merely an analytical distillation of cases interpreting the interests served by the knock-and-announce statute, Title 18 U.S.C. §3109 (*Banks*, 282 F.3d at 705; App. *infra* 6a). The petitioner overstates the significance of the guidelines and glosses over the fact that the majority opinion utilized a *totality of the*

circumstances test to determine reasonableness under Fourth Amendment standards (*Banks*, 282 F.3d at 705; App. *infra* 6a). There is no rigid categorical approach as argued by petitioner in the *Banks* opinion which mandates announcement in derogation of this Court's opinion in *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (Pet. 7). In *Wilson*, this Court addressed the Arkansas Supreme Court's finding that there is no authority for the proposition that the common law knock-and-announce principle formed a part of the Fourth Amendment reasonableness inquiry. In *Wilson*, this Court was presented with a state court prosecution predicated on evidence seized on a search warrant executed by the police. The facts there involved an informant who made a series of purchases of drugs from Ms. Wilson. On the last drug buy, Ms. Wilson waved a gun in the informant's face and threatened to kill her if she was working for the police. Search warrants were obtained and the police executed the warrant without making any knock-and-announcement. After entering, the police found Ms. Wilson in the bathroom flushing drugs down the toilet. Ms. Wilson filed a motion to suppress claiming, among other things, that the officers executing the warrant failed to knock-and-announce their purpose. This Court, in a unanimous opinion, authored by Justice Thomas, reversed the Arkansas Supreme Court's affirmance and remanded the matter for determination below whether the search might be constitutionally defective or if law enforcement interests may establish the reasonableness of an unannounced entry. *Wilson*, 514 U.S. at 936. The remand was made despite the State of Arkansas and the Solicitor General's argument that the record sufficiently justified the entry because of the reasonable belief, by the officers, that a prior announcement would place them in peril and the potential that evidence would be destroyed (Id. 514 U.S. at 937)

The respondent argues that "by making the amount of time that officers must wait vary according to whether execution of a warrant requires property damage" is at odds with this Court's decision in *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (Pet. 7). First, to the extent that the majority opinion in *Banks* refers to a guideline addressing absence of property damage, the holding does not turn on this factor because *Banks* involves the damage of property. The

distinction made in the guidelines discussed by the majority opinion in *Banks* does not place the decision at odds with this Court's decision in *Ramirez*. This Court's decision in the *Ramirez* case teaches that the Fourth Amendment does not hold officers to an enhanced or higher standard of showing of exigent circumstances where a "no knock" entry results in the destruction of property. 523 U.S. 65 at 71. The insistence on a heightened showing of exigency was the basis of the decision by the court of appeals that the fruits of the search were a result of a Fourth Amendment violation. In *Ramirez*, the Chief Justice delivered a unanimous opinion of the Court. The case involved a police search for a violent escapee who was believed to be at the *Ramirez* residence. The escapee, according to an informant, had guns and drugs stashed in the garage. The Chief Justice, speaking for this Court, rejected the notion that a heightened standard of exigency applies to a no knock if the entry requires destruction of property. The instant case addresses a different issue under Title 18 U.S.C. §3109, which is whether under the totality of the circumstances the officers paused sufficiently before inferring a refusal of admittance. The *Ramirez* case involved particularized facts which the officers used to form a reasonable suspicion that knocking and announcing would be "dangerous" and "destructive" to the purposes of the investigation. The majority's guideline in *Banks*, addressing whether an entry can be made without a breaking, is certainly a relevant factor to consider under a totality of the circumstances test. If Mr. Banks' door was open and no breaking occurred, this logically should have some significant place in a court's consideration whether under the Fourth Amendment standards the officers had paused sufficiently before entering.

The *Ramirez* decision cites *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997). In *Richards*, this Court was confronted with a blanket exception to the knock-and-announce requirement under common law principles. In *Richards*, the police executed a search warrant on a motel room in connection with a drug investigation. The State Supreme Court adopted a *per se* rule that police officers are never required to knock-and-announce when executing a warrant in a felony drug investigation. The rationale for this rule of

the State Supreme Court was based upon generalizations about today's drug culture. Justice Stevens delivered the unanimous decision of this Court, while affirming that under facts specific to the case, held that there was no constitutional violation. In *Richards*, this Court reaffirmed the principle that *specific* information of exigent circumstances can justify dispensing with the knock-and-announce rule while generalized concerns, dangerousness or destruction of evidence do not. 520 U.S. at 392. This Court in *Richards*, reaffirmed the need for *case by case* evaluation of the manner in which a search is conducted. Justice Stevens in footnote 4 stated:

> It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness "is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted - - even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" *Minnesota v. Dickerson*, 508 U.S. 366, 380, 124 L.Ed.2d 334, 113 S.Ct. 2130 (1993) (Scalia, J., concurring). 520 U.S. at 393.

A reading of the *Richards'* case reflects that it was the state and petitioner who were urging this Court to adopt a rigid rule dispensing with the knock-and-announce rule in felony drug investigations. Before leaving the *Richards* case, an analysis of the privacy interests served by the knock-and-announce rule is setforth in footnote five of the *Richards* opinion, Justice Stevens pointed out:

> when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry . . . [t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.

520 U.S. at 393. This same privacy concern is given meaning by the requirement that the searching officers are to pause a reasonable period of time before inferring a refusal of admittance.

Petitioner argues that the *Ramirez* case holds that the lawfulness of an entry does not depend on a special showing of "reasonable suspicion" where property is destroyed to effectuate a no knock entry and that it, "follows that the prospect of property destruction does not require additional delay in the circumstances presented here." (Pet. 12) This logic is flawed. It

compares apples to oranges. The *Ramirez* case addressed the issue of whether a heightened showing of exigent circumstances or reasonable suspicion is necessary to justify a "no knock" destructive entry. The *Banks* majority opinion did not address the issue of reasonable suspicion justifying a shortened pause between the announcement and the forcible entry. In *Banks*, no reasonable suspicion of exigent circumstances were found to be present. No particularized fact existed which justified a hastened entry in *Banks*. The generalized concerns for officer safety and destruction of evidence were the driving factors in the officers' decision to effectuate a forcible entry in 20 seconds or less. These generalized concerns were the same ones rejected by this Court in *Richards* as a basis to dispense with the knock-and-announce requirement in all drug cases. The petitioner strains to make the *Banks* case the *Ramirez* case. They involve two very different issues of fact and law under the knock-and-announcement statute, Title 18 U.S.C. §3109.

B. The *Banks* Decision Presents a Fact Specific Resolution of What Constitutes a Reasonable Pause Before Making a Forcible Entry. The *Banks* Decision Does Not Create a Conflict with Decisions of Other Courts of Appeals.

Petitioner argues that the *Banks* majority opinion conflicts with the decisions of other circuit courts (Pet. 12). This is not so. The *Banks* majority opinion is based upon the unique matrix of facts presented in this case. The case does not establish any set times for law enforcement to pause, it simply found that under the totality of the circumstances presented in this case, that the 20 second or less pause between announcement and forcible entry was not reasonable. All of the cases cited by the petitioner are distinguishable.

Here, the officers were executing a search warrant in a drug investigation. The apartment in question was occupied by only one person. While the search of the two bedroom upstairs apartment occurred at two in the afternoon, the officers executed the warrant at a time when Mr. Banks was taking a shower. No particularized suspicious exigent circumstances were known to the officers and no affirmative refusal of entry occurred. Mr. Banks testified that he heard no knock-and-announcement just the boom of the door being rammed in. None of the cases cited by

the petitioner present these unique set of facts. Since the totality of the circumstances takes into account facts not found in other circuit court opinions, there is no actual "conflict" between circuit courts.

The first case cited by petitioner is *United States v. Lucht*, 18 F.3d 541, (8th Cir. 1994). In *Lucht*, the police executed numerous search warrants in a large scale drug investigation. Several search warrants were executed without any knock-and-announcement due to the existence of exigent circumstances. See *Lucht*, 18 F.3d. at 549. One home that was searched was small (the Volkir and Runsey residence). The two occupants were awake and "the possibility was slight that those within did not hear or could not have responded promptly." Id at 549. There is no mention in *Lucht* of the occupants taking a shower. Further, where there is more than one occupant, it is very unlikely they will be showering together, thus rendering it unreasonable to expect that an occupant could respond in 20 seconds or less. It is worth noting that the Ninth Circuit addressed a very similar fact pattern knock-and-announce case decided *after Banks*. This case is *United States v. Chavez-Miranda*, 306 F.3d 973 (9th Cir. 2002). In *Chavez-Miranda*, the DEA executed a search warrant after making controlled buys. The search warrant execution occurred at 6:15 p.m. on a small two bedroom apartment less than 800 square feet in area. The officer there conducted the knock-and-announcement in both English and Spanish. No response to the announcement was forthcoming. After 20 to 30 seconds the door was forced open. The Ninth Circuit noted the similarities between the *Banks* case and its fact pattern in *Chavez-Miranda* 306 F.3d 973 at 980-81. In *Chavez-Miranda* the court noted:

> We note that there are a number of similarities between *Banks* and this case. In both cases the apartments were small and the narcotics warrants were being executed at a time when one would reasonably expect the residents to be awake. In addition, in both cases the police did not hear any noise from inside the apartments suggesting that they had been heard but were being refused admittance, and no exigent circumstances present.

Despite these similarities, in the *Chavez-Miranda* case the district court's denial of the suppression motion was affirmed. The Ninth Circuit distinguished *Chavez-Miranda* from *Banks* because there were at least three known occupants in the small apartment. The police also had

specific knowledge of the apartment layout and size. In *Banks*, the police did not know if anyone was home. Lastly, the court in *Chavez-Miranda* reasoned that "even if one of the three individuals inside the apartment was in the bathroom or otherwise indisposed, one of the others should have been available to respond." 306 F.3d at 981. This same distinction from the *Banks* case exists in both *Lucht* and *Chavez-Miranda*. *Chavez-Miranda* reveals that *Banks* has not created a "rigid rule" or fixed time on how much pause is a reasonable period under the totality of the circumstances.

The next case cited by the petitioner is *United States v. Spriggs*, 996 F.2d 320 (D.C. Cir. 1993) (See Pet. 13). In *Spriggs*, the DEA executed a search warrant at 7:45 a.m. on a weekday. The agents waited approximately 15 seconds between the knock-and-announcement before forcing the door open. The Court of Appeals for the District of Columbia noted that when the door was forced open, Spriggs and his wife were found coming out of the bedroom door some 25 to 35 feet away from the point of entry. *Spriggs*, 996 F.2d at 322. There is no mention of Mr. Spriggs being "indisposed" although he initially challenged the search on the basis of a single knock-and-announcement being unlikely to be heard in the morning. Again, there were two occupants in *Spriggs*, unlike *Banks*. In *Banks* there was uncontroverted evidence that he was in the shower when the knock-and-announcement occurred. The prosecution in *Banks*, argued, at the district court level, that the shower prevented him from hearing the knock-and-announcement. The District of Columbia Circuit could have well decided the *Banks* case in the same fashion as the Ninth Circuit given its recognition: "The time that section 3109 requires officers to wait before they may construe no response as a denial of admittance depends largely on the factual determinations made by the trial court." *Spriggs*, 996 F.2d at 322. The *Spriggs* court noted that in *Griffin v. United States*, 618 A.2d 114 (D.C. App. 1992), a 30 second delay was found insufficient under the knock-and-announcement requirement, because the search was conducted at 1:30 a.m. and it was unreasonable to think the occupants were awake and able to respond promptly.

The next case cited by petitioner is the Fifth Circuit Case, *United States v. Jones*, 133 F.3d 358 (5th Cir. 1998) (Pet. 14). In *Jones*, the police executed a search warrant after pausing 15-20 seconds after the knock-and-announcement. The facts recounted in the *Jones* case are scant to say the least. Mr. Jones argued that 15 to 20 seconds is not a reasonable period to expect an occupant to respond "a potentially unexpected announcement." While it is somewhat speculative, one would suspect that had Mr. Jones been the sole occupant and been indisposed for some reason, these facts should have merited mention. In *Jones*, the Fifth Circuit found a 15-20 second wait (under a common-law knock-and-announcement rule) sufficient time given the danger in drug cases of destruction of evidence. *Jones*, 133 F.3d at 361-362. The record is barren of any particularized facts justifying this fear. The *Jones* court did note: "It is possible that a delay in a particular case might be too short to imply refusal of admittance under section 3109, but would be reasonable for the Fourth Amendment . . ." *Jones* 133 F.3d at 361. The Fifth Circuit in *Jones* recognized that a time frame greater than 15-20 seconds might be necessary under Title 18 U.S.C. §3109, which is the provision applicable to analysis under the *Banks* case.

The next case cited by petitioner is *United States v. Garcia*, 983 F.2d 1160 (1st Cir. 1993) (Pet 14). In *Garcia*, police officers obtained a state search warrant after having a controlled buy. The officers went to the apartment and knocked and announced their presence. They waited ten seconds and after hearing no response made a forcible entry. When the officers burst through the door they saw the defendants and a woman holding a child in the front room watching television. *Garcia*, 983 F.2d at 1168. The court in *Garcia* focused primarily on the easily hidden or destroyable nature of the evidence as justifying the short pause. The facts in *Garcia* indicate that the officers were aware of the immediate presence of the occupants given that they were watching television just behind the closed door, and the failure to respond quickly gave rise to a reasonable inference of refusal. This was not specifically addressed in the court's analysis, it does however, provide justification for the short delay. Again, the facts specific to the *Banks*

case were not the facts before the *Garcia* court.

The petitioner cites the case of *United States v. Gatewood*, 60 F.3d 248 (6th Cir. 1995) to argue that the *Banks* decision conflicts with other circuit courts (Pet. 14). In *Gatewood*, the police officers executed a search warrant by knocking and announcing. A video tape of the incident revealed that the occupants unlocked the door and opened it after ten seconds. There was no forcible entry in the case. The *Gatewood* case is a knock and admittance case. The *Gatewood* court, despite the clear evidence of admittance, alternatively concluded had a forcible entry occurred, the delay was reasonable. 60 F.3d at 250-51. In contrasting *Gatewood* with *Banks*, had respondent actually answered the door, undoubtedly, there would have been a different result in the Ninth Circuit.

The petitioner refers to the case of *United States v. Markling*, 7 F.3d 1309 (7th Cir. 1993), as a case which is at odds with the *Banks* majority opinion (Pet. 14). In *Markling*, the police executed a search warrant on a motel room as part of a drug investigation. The police, prior to executing the search warrant, observed Mr. Markling return to his motel room about 5 p.m. Thereafter, two suspected drug buyers went to the motel room and after six minutes they departed. The two were stopped, searched and two bags of cocaine base were recovered from their persons. One of the drug buyers advised that Mr. Markling was "extremely paranoid" and would flush any other drugs in the room down the toilet if he became suspicious." *Markling*, 7 F.3d at 1312. At about 7 p.m. the police executed the search warrant through a knock-and-announcement at adjoining room door, waited seven seconds, hearing no response then made a forcible entry. They discovered Mr. Markling in a fetal position on the bathroom floor. Id. The obvious difference in facts between the *Banks* case and *Markling* is the particularized knowledge from the officers investigation that Mr. Markling was highly likely to destroy evidence. This case presents exigent circumstances which were not present in the *Banks* case. Obviously, most, if not all, motel rooms are significantly smaller than a two bedroom apartment. The officers heard no noise which might make the announcement difficult to hear. Under these different facts

the Seventh Circuit found that it was reasonable for the officers to conclude after a seven second lapse Mr. Markling "was not going to answer the door." *Markling*, 7 F.3d at 1318.

Petitioner next cites *United States v. Goodson*, 165 F.3d 610 (8th Cir. 1999) as another example of how *Banks* is at odds with other circuit courts (Pet. 14). The *Goodson* case involved the search of a one story ranch home. The police officers, executing a search warrant for drugs at 1:44 a.m., knocked twice and announced their presence (and presumably their purpose). *Goodson* 165 F.3d at 614. In *Goodson*, the officers were concerned for officer safety because the suspect had a violent criminal history for assault with a deadly weapon. The officer, after waiting 20 seconds for a response, forced entry because he feared for officer safety and was concerned about destruction of evidence. This case involves exigent circumstances. Here, the forcible entry after a 20 delay was upheld because there was a particularized concern for officer safety. In *Banks*, the officers had no known violent criminal history of the suspect which would give rise to reasonable suspicion that a greater risk to officer safety existed. These important facts are different between the two cases and account for the differing results under the totality of the circumstance's test.

The last case cited by the petitioner as indicative of the majority opinion in *Banks* as being out of conformity with other circuit courts is *United States v. Jenkins*, 175 F.3d 1208 (10th Cir. 1999). In *Jenkins*, the police obtained a search warrant as part of a narcotic's investigation. The search warrant was authorized to search the residence of the co-defendant Monika Payne, the girlfriend of Mr. Jenkins. Mr. Jenkins had a child with Ms. Payne and regularly resided at the house. Id. *Jenkins* involved a search executed at 10 a.m. In *Jenkins*, the police were aware that there were multiple occupants in the home. The surveillance established that although the residence was Ms. Payne's, Mr. Jenkins was regularly present. *Jenkins*, 175 F.3d at 1216. The total time between the initial knock-and-announce and the application of force on the inner door, was 14 to 20 seconds. *Jenkins*, 175 F.3d at 1211. When the officers entered the home they found Mr. Jenkins' girlfriend, Ms. Payne, near the front door. Mr. Jenkins and his daughter were

in a bedroom where they were laying on the bed. *Jenkins*, 175 F.3d at 1211. Mr. Jenkins contended the police department had a ten second wait policy before force would be applied after an announcement. *Jenkins*, 175 F.3d at 1212. The Tenth Circuit noted that the record below did establish that the Wichita police department trains its officers to wait ten seconds after knocking and announcing before forcibly entering a residence "which apparently does not vary according to the size of the premises to be searched." 175 F.3d at 1214. The Tenth Circuit noted "such an inflexible policy clearly would violate the knock-and-announce standard. c.f. *United States v. Ward*, 171 F.3d 188 (4th Cir. 1999) (stating that a purported sixty second FBI policy would be troublesome under section 3109 in light of rule that amount of time officers must wait varies with exigencies of each case). The *Jenkins* court expressed "grave concerns" over the rigid rule of the Wichita Police Department's "10 second" policy. *Jenkins*, 175 F.3d at 1214-15. The *Jenkins* court noted that "compliance with the knock-and-announce component of the Fourth Amendment reasonableness inquiry must be evaluated on a fact dependent, case by case basis." 175 F.3d at 1214. The *Jenkins* court noted in reviewing the relevant case law that "the prospect of utilizing these cases as guideposts is appealing, a bright line rule for determining how much time is enough is inappropriate." 175 F 3d at 1213. The *Jenkins* court sustained the forcible entry into the home after a wait of 14 to 20 seconds. It noted that the police knocked and announced twice. Further, the *Jenkins* court noted that the warrant was executed in the middle of the day when "'most people are awake and engaged in everyday activities.'" 175 F.3d at 1215 c.f. *United States v. Spikes*, 158 F.3d 913, at 927 (6th Cir. 1998). The distinguishing facts between *Banks* and *Jenkins*, are that the officers in *Jenkins* believed that there were multiple occupants at the residence where, as in *Banks*, the officers were aware of only one occupant, and did not know whether he was even home when the warrant was executed. Further, in the *Jenkins'* case, because of multiple occupants, it was unlikely that if one person was "indisposed" that the other occupants would be unable to respond in the 14 to 20 second time frame. Petitioner states: "While complete uniformity cannot be expected on such a fact sensitive

question as reasonableness of a delay before entry, the Ninth Circuit's approach is significantly out of step with that of other circuits." (Pet. 15). The Ninth Circuit's approach in *Banks* was the application of the totality of the circumstances test. *Banks*, in the majority opinion, concluded that under the unique facts of that case, it was unreasonable to infer a refusal in 15 to 20 seconds where the sole occupant was indisposed in the shower. Apparently, petitioner wants this Court to announce a rigid rule that 15 to 20 seconds constitutes sufficient time to infer a refusal under the knock-and-announcement statute. This would virtually eliminate the Court's supervisory role in a crucial area of the Fourth Amendment. The adoption of a rigid rule of 20 seconds would short circuit Fourth Amendment reasonableness inquiries. Petitioner states that it does not expect "complete uniformity" on a fact bound determination of reasonableness. Yet this is the main reason that petitioner argues review is warranted.

C. The Suppression of Evidence in *Banks*, Vindicates Fundamental Fourth Amendment Protection Against Invasions of Privacy.

The petitioner asserts that "even if the officers had waited longer, respondent still would not have heard them" and answered the door. (Pet. 15). The argument is essentially that the forcible entry would have inevitably been made anyway (albeit at a later point in time) so that there was "no harm and no foul." The petitioner then contends the sanction of suppression is in effect disproportional punishment on society's interest in effective law enforcement. (Pet. 15-17).

Petitioner cites *United States v. Espinosa*, 256 F.3d 718 at 725 (7th Cir. 2001) for the proposition that "the application of the exclusionary rule should be limited only to those instances where the constitutional violation has caused actual harm . . ." Respondent's Fourth Amendment privacy interests *were* harmed. He was confronted with armed strangers bursting into his home while he stumbled naked, wet and in fear for his life.

In *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed. 2d 1332 (1958), police officers went to Mr. Miller's home to arrest him for narcotics violations. The officers knocked and said "Police," but did not indicate they had an arrest warrant. Mr. Miller then tried to shut

the door and they forced entry. Inside, narcotics were seized incident to arrest. The one issue on appeal was the officer's failure to announce his purpose before entry pursuant to Title 18 U.S.C. §3109. In determining the failure to announce the officer's purpose prior to forcible entry was a violation of §3109, Justice Brennan, speaking for this Court stated:

> We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However, much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in §3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

Miller, 357 U.S. at 313. Although it will never be known for sure, had the officers in *Banks* paused just a bit longer, it might have afforded respondent the chance to have met the intruders with the small dignity of a towel. It is just this sort of privacy interest which is at the very core of the Fourth Amendment. Respondent denies petitioner's assertion that there was no causal relationship between the violation of the Fourth Amendment and his privacy interests. (See, Pet. 16).

D. The Fourth Amendment's Flexible Reasonableness Standard Precludes the Formulation of Bright Line Rules.

Petitioner complains that the *Banks* case "guidelines" are generalizations that "are insufficient to provide meaningful guidance to officers engaged in the dangerous business of executing search warrants." (Pet. 17). Contrary to this assertion, the majority opinion in *Banks* attempted to distill categories from case law, to serve as aids or analytical tools. *Banks*, 282 F.3d at 704. The *Banks* majority opinion provided an effort to explain from earlier cases, categories where anyone, including law enforcement, could better understand this area. The guidelines are not intended to replace the case by case analysis required under the Fourth Amendment

reasonableness standard. The petitioner would prefer "bright-line" rules as it urged this Court to adopt in *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed 2d 615 (1997). In *Richards*, this Court was asked to approve the Wisconsin Supreme Court's blanket exception to the knock-and-announce requirement whenever the case involved a felony drug investigation. Justice Stevens, speaking for a unanimous Court, rejected the notion that a blanket exception to the knock-and-announce requirement disappears whenever a felony drug investigation is present. In Wisconsin, the State Supreme Court determined that no specific information about dangerousness or the possible destruction of drugs was necessary to dispense with the knock-and-announce requirement. This Court was squarely presented with the issue of whether generalizations about today's drug culture"justifies dispensing with case-by-case evaluation of the manner in which a search was executed." *Richards*, 520 U.S. at 391-392. Justice Stevens noted: "If a *per se* exception were allowed for each category of criminal investigation that included a considerable-albeit hypothetical-risk of danger to the officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." *Richards*, 520 U.S. at 394.

This Court in *Richards* recognized the dangers inherent in providing rigid rules or exceptions to the knock-and-announce requirement. Justice Stevens noted "the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock-and-announce in a particular case." *Id.* "Facts" under a reasonableness analysis may justify no knock in one case, facts in another case may make a pause of 15-20 seconds unreasonable. The complained of "guidelines" do not alter, amend or supplant the case by case totality of the circumstances analysis mandated by the Fourth Amendment. The uncertainty complained of by petitioner is really that which is inherent in the application of the law to the facts.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED this January 23, 2003.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers. That on January 23, 2003, she served a copy of the above and foregoing Brief by placing said copy in a postpaid envelope, addressed to the person(s) hereinafter named, at the address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States mail at Las Vegas, Nevada or by hand delivery.

Addressee: Solicitor General of the United States
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Helena Bozzo